No. 06-736

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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By holding that "any physical change" is unambiguous even though "physical change" is ambiguous (Pet. App. 5a-7a), the court of appeals contravened settled principles of statutory construction and this Court's cases construing the term "any." Under ordinary interpretive principles, "any physical change" is subject to multiple meanings—a point underscored by regulations that the Environmental Protection Agency (EPA) promulgated *before* Congress adopted the statutory New Source Performance Standards (NSPS) definition of "modification" for the New Source Review (NSR) program. The court of appeals' contrary holding would not only invalidate this important rulemaking, it would also hamstring EPA's ability to implement the NSR program in the future and call into question numerous longstanding aspects of that program. The decision would also pose a substantial threat to the interpretive discretion of all agencies charged with administering statutes that use the common term "any."

A. The Common Term "Any" Does Not, By Itself, Dispel Ambiguity In The Terms It Modifies

The court of appeals fundamentally erred by holding that "any physical change" is unambiguous even though "physical change" is ambiguous. See Pet. App. 5a-7a. Although respondents argue (Br. in Opp. 8) that the court of appeals did not rely solely on the word "any," that court, in fact, held that "[b]ecause Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" Pet. App. 7a. And again: "[W]hen Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them." *Id.* at 12a; see *id.* at 6a, 17a.[*]

As this Court has explained, however, "'any' can and does mean different things depending upon the setting." *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004). Even when "any" is used as a catchall, it does not "define what it catches." *Flora* v. *United States*, 362

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[*] Although the court of appeals noted that Congress limited the definition of "modification" to physical changes that "increase[] the amount of any air pollutant" (42 U.S.C. 7411(a)(4)), the court discussed the latter clause only after deeming the statute unambiguous because it uses the word "any." See Pet. App. 11a-12a. Moreover, the requirement that a physical change increase air pollution in order to be considered a "modification" has no bearing on the meaning of "any physical change." Instead, increasing air pollution is a *separate* aspect of the definition of "modification." That separate aspect was the subject of the D.C. Circuit's decisions in *New York* v. *EPA*, 413 F.3d 3 (2005), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 399-400 (1979), and is now before this Court in *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006).

U.S. 145, 149 (1960). Just this Term, this Court held that a statute's "reference to '*every* action for money damages' founded upon '*any* contract'" did not include administrative (as opposed to judicial) actions, because the terms "'every' and 'any' * * * do not broaden the ordinary meaning of the key term 'action.'" *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 644-645 (2006) (quoting 28 U.S.C. 2415(a)). So too here, "any" does not unambiguously require the broadest reading of the term "physical change."

The court of appeals' contrary holding appears to be unprecedented. While this Court has occasionally read statutes broadly based in part on their use of the term "any," the Court has never rejected an agency's interpretation on that ground. Rather, in those cases the Court was generally making its own determination of the best reading of a statute outside of the framework proscribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. 12-13. Respondents' retort (Br. in Opp. 7) that "*Chevron* step one * * * entails *judicial* determination of a statute's meaning" misses the point: under the first step of *Chevron*, the judicial determination concerns not what a statute means, but rather whether the statute is ambiguous. And, of course, when a court construes an ambiguous statute in the absence of an authoritative agency interpretation, its selection of the best reading of the statute does not foreclose the administering agency's ability to select another permissible interpretation instead. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005).

Moreover, this Court has narrowly construed statutory phrases including the word "any" at least as often as it has broadly construed them. See Pet. 12, 13. While respondents (Br. in Opp. 10) discount some of those

cases on the ground that a broader reading of "any" would have contravened a strict-construction canon, that does not account for all of the cases. See *Flora*, 362 U.S. at 150-151 (resorting to "other materials," including relationship with other statutes, only after determining the text was ambiguous); *BP Am.*, 127 S. Ct. at 644-645 (concluding that the terms "any" and "every" "do not assist petitioners" because they do not broaden the terms they modify).

The most analogous example is perhaps *Chevron* itself. There, this Court held that the Clean Air Act's definition of "stationary source," which included "any building," was ambiguous. 467 U.S. at 859-862 (quoting 42 U.S.C. 7411(a)(3)). While respondents argue (Br. in Opp. 11) that the definition of "stationary source" was not implicated by the specific question in that case—viz., whether individual buildings in a complex were separate stationary sources—this Court specifically recognized that "the definition * * * could be read to impose the [NSR] permit conditions on an individual building that is a part of a plant." *Chevron*, 467 U.S. at 860. The Court nonetheless concluded that the definition was ambiguous on that point. *Id.* at 861-862. Under the court of appeals' holding in this case, however, the statute would not be ambiguous, because "any building" would take its broadest meaning, including a building that is part of a larger plant.

There is no basis for respondents' assertion (Br. in Opp. 11-12 & n.8) that the United States has taken a contrary position. One of the government briefs cited by respondents did not rely on the term "any," but instead relied on the meaning of the term that followed it. Gov't Br. at 13-15, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (No. 02-1343).

The other brief argued that Congress's use of the term "any" in one but not another portion of a statute supported the Government's interpretation; the Government did not argue that "any," standing alone, had special significance divorced from context, much less that it rendered an otherwise ambiguous term unambiguous. Gov't Br. at 19, *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626).

B. The Clean Air Act's Definition Of "Modification" Does Not Unambiguously Require The Broadest Meaning Of "Physical Change"

The court of appeals' error was critical in this case because, under traditional canons of statutory construction, the definition of "modification" does not unambiguously require the broadest meaning of "physical change." Not only is the phrase "physical change" "susceptible to multiple meanings," as the court of appeals recognized, Pet. App. 5a, the statutory context also demands that the agency distinguish between routine efforts to maintain a facility and efforts to change the facility. When Congress crafted the statutory NSR program in 1977, it adopted the statutory definition of "modification" already used in the NSPS program. See Pet. 3-4. Respondents do not dispute that from the earliest days of the NSPS program, EPA interpreted that definition to exclude routine maintenance, repair, and replacement, as well as a number of other activities that could increase emissions by more than *de minimis* amounts. See Pet. 4-5, 16-17. Congress's decision to adopt the pre-existing statutory definition without modification strongly suggests that it viewed the agency's existing approach as a permissible interpretation of the statutory definition.

None of respondents' contentions detracts from that conclusion. While respondents argue that the Government is now advancing a ratification argument it previously disclaimed, the Government's position has always been the same: that while Congress did not set in stone the agency's previous interpretation, *i.e.*, ratify it, such that the agency would lack authority to modify it, Congress's adoption of the statutory NSPS definition of "modification" confirms that the agency's pre-existing interpretation of that definition is reasonable. See Pet. 20 n.9. Respondents misleadingly quote the Government's court of appeals brief as stating that "EPA does not contend that . . . Congress 'ratified' [the routine maintenance] exclusion; in fact, EPA has explicitly disclaimed any such argument." Br. in Opp. 12 (quoting Gov't C.A. Br. 19). But respondents omit the very next sentence of that brief, which explains that "Congress's action does, however, suggest that Congress did not consider EPA's interpretation of 'modification' (and more particularly 'physical change') to exclude routine maintenance, repairs and replacements to be unreasonable or outside of EPA's discretion." Gov't C.A. Br. 19-20.

Respondents' contention (Br. in Opp. 13) that to prove ratification, the Government must demonstrate "that Congress was aware of, and intended to incorporate, the preexisting regulatory exemptions," is thus directed toward an argument EPA has not made. (In any event, Congress was clearly aware of EPA's regulations, because it explicitly rejected some of them while directing that the others remain in place, at least for an initial period. 42 U.S.C. 7478.) With respect to the argument the Government *is* making, respondents argue only that "[w]here the law is plain, subsequent reenactment" is not relevant. Br. in Opp. 14 (quoting *Brown* v.

Gardner, 513 U.S. 115, 121 (1994)). As discussed, however, the statutory text is not plain, because the term "any" is not dispositive.

Respondents also misperceive the relevance of EPA's longstanding regulations. They note that EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances." Br. in Opp. 15 (quoting 70 Fed. Reg. 33,841 (2005)). But respondents erroneously conflate de minimis *circumstances* with de minimis *emissions increases*. *Id.* at 2, 15. The routine maintenance, repair, or replacement exclusion has, since its inception, turned on a "case-by-case determination * * * weighing the nature, extent, purpose, frequency, and cost *of the work* as well as other relevant factors to arrive at a common sense finding." Pet. App. 3a-4a (quoting 67 Fed. Reg. 80,292-80,293 (2002)) (emphasis added). Thus, the inquiry has turned on the nature of the work, not on the extent of any resulting emissions increases. Pet. 16-17.

Respondents also err (Br. in Opp. 15) in attempting to dismiss the significance of other longstanding regulatory exclusions from the definition of "modification"—including exclusions for increases in the production rate or hours of operation, and for changes in fuel or raw materials—on the theory that those exclusions "construed statutory language not at issue here." The statutory definition of "modification" refers in part to "any physical change in, or change in the method of operation of, a stationary source." 42 U.S.C. 7411(a)(4). Even assuming that the other longstanding exclusions are "change[s] in the method of operation," rather than "physical change[s]," *ibid.*, both clauses are part of the definition of "modification," and both use the term "change" modified by "any." Thus, at the time Congress

adopted the statutory NSPS definition of "modification," EPA's regulations made clear that the statutory phrase "any * * * change" did not include all activities causing non-de minimis emissions increases.

C. The Question Presented Warrants Review

This case warrants this Court's review for a number of reasons. The term "any" is commonly used in statutes—as seen by the number of times this Court has considered that term. If "any" dispelled ambiguity in the terms that follow, and thereby required agencies to give those terms their broadest meanings, agencies could lose discretion to give reasonable interpretations to numerous administrative-law statutes. The importance of the D.C. Circuit's decision is magnified by that court's prominence in administrative law.

Even apart from its broader significance, the decision below would warrant review in light of its impact on NSR. As petitioners in *Utility Air Regulatory Group* v. *New York*, No. 06-750 (filed Nov. 27, 2006), explain, and respondents do not dispute, this Court has granted review in several cases concerning NSR and the related Prevention of Significant Deterioration program. 06-750 Pet. at 19-20. This NSR case has particular importance because the court of appeals' decision invalidates a vitally important rulemaking, puts EPA in a straightjacket going forward, and even jeopardizes exclusions that EPA has recognized *since the very inception of the NSR program*. Those exclusions include not only the routine maintenance, repair, and replacement exclusion, but also exclusions for increased hours of operation, increased production rate, and changes in fuels or raw materials—all of which can cause non-de minimis increases in emissions. See Pet. 16-19, 24; pp. 5-7, *supra*.

By contending (Br. in Opp. 16-17) that only changes that cause more than de minimis emissions increases will trigger NSR requirements under the court of appeals' decision, respondents only underscore the problems posed by that decision. As discussed, EPA has never limited the routine maintenance exclusion to de minimis emissions increases. Nor has it limited the other exclusions to de minimis increases. Thus, the court of appeals' decision not only invalidates this important rulemaking, but also suggests that EPA must alter its longstanding approach.

Moreover, much of the point of the exclusions is to eliminate the need to engage in a burdensome and uncertain process of determining, on a case-by-case basis, whether particular activities are subject to NSR. Pet. 22. That EPA has some flexibility to determine how to calculate an emissions increase (Br. in Opp. 16-17) does little if anything to address the burdens caused by requiring EPA to determine in every case whether an activity would cause a non-de minimis increase, and to apply NSR to every activity that would do so.

Respondents also argue incorrectly (Br. in Opp. 18-19) that EPA's regulation would harm the environment. At the outset, that contention is beside the point, because the court of appeals determined at the first *Chevron* stage that EPA has *no* relevant discretion. Even if EPA's line-drawing were in some way flawed (it is not), that would be relevant only to respondents' *Chevron* step-two and arbitrary-and-capricious challenges, which the court of appeals did not reach; it would not be a reason to deprive the agency of *all* discretion going forward. Moreover, the statute does not direct EPA to consider only maximizing protection for the environment; as the court of appeals acknowledged, the statute strikes a

"balance * * * between 'the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.'" Pet. App. 11a (quoting *Chevron*, 467 U.S. at 851); see *id.* at 8a.

In any event, EPA's rule has environmental benefits. Respondents contend (Br. in Opp. 2-3, 15, 19) that the rule's 20% cost threshold could allow costly replacements that could, in turn, substantially increase a plant's annual emissions. But EPA's rule applies only to functionally equivalent replacements that are consistent with a source's basic design parameters and do not cause the source "to exceed any emission limitation, or operational limitation * * * that is legally enforceable." 40 C.F.R. 52.21(cc)(3). The rule thus does not serve as a license to engage in any and all emissions-increasing changes below a 20% cost threshold.

Most important, respondents do not dispute that the uncertainties inherent in EPA's former case-by-case approach deterred companies from making repairs that would make their plants cleaner and more efficient. Nor do respondents appear to deny that encouraging such repairs would benefit the environment, in part by reducing high-emission restarts, shut-downs, and malfunctions. In any event, EPA's expert judgment on that point is certainly reasonable. See Pet. 21-23.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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